Supreme Court, U.S.
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No. 88-398

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COMMONWEALTH OF PENNSYLVANIA,
PUBLIC UTILITY COMMISSION,
Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, as the Court of Appeals held, the reference to "any taxes or other fees imposed by any State" in 45 U.S.C. § 546b embraces special assessments for local public improvements.

PARTIES

The parties to the proceedings below included the parties named in the caption of this case and the Township of Tredyffrin.*

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* National Railroad Passenger Corporation ("Amtrak") is a corporation chartered under the laws of the District of Columbia in accordance with section 301 of the Rail Passenger Service Act, 45 U.S.C. § 541. Amtrak is not a subsidiary of any other corporation. Amtrak owns 100% of the capital stock of the Chicago Union Station Company and the Washington Terminal Company.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent National Railroad Passenger Corporation ("Amtrak") respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Third Circuit Court of Appeals in this case. That opinion is reported at 848 F.2d 436.

ARGUMENT

The Court of Appeals correctly affirmed the district court and correctly held that 45 U.S.C. § 546b, exempting Amtrak from "any taxes or other fees", included immunity from assessments for local public improvements. The court's holding does not conflict with any decision of this Court or with any decision of other courts of appeals. The case does not warrant this Court's review.

1. The Lower Courts Correctly Construed the Statute.

Petitioner quarrels with the way the Court of Appeals interpreted the governing statute, 45 U.S.C. § 546b. (Pet., 11-19) That quarrel is misplaced.

Petitioner argues that Amtrak is not a "federal instrumentality."[1] This, however, overlooks the fact that Congress has the undoubted authority to create corporations and to protect their operations by the grant of immunity from state and local taxation. *Pittman v. Home Owners' Corp.*, 308 U.S. 21, 32-33 (1939). It did so as to Amtrak. *National R.R. Passenger Corp. v. New Castle County*, 633 F.Supp. 354, 360 (D. Del. 1986).

Cases construing the scope of such federally-granted tax immunities uniformly recognize that special assessments for local improvements are, indeed, "taxes." The leading case is *Federal Reserve Bank of St. Louis v. Metrocentre Improvement District No. 1*, cited in both of the opinions below, where this Court summarily affirmed the decision by the Eighth Circuit, 657 F.2d 183, 186 (8th Cir. 1981), *aff'd*, 455 U.S. 995 (1982). In that case the Federal Reserve Bank was held to be exempt from a special assessment for a central business district improvement project in downtown Little Rock, Arkansas.

Other decisions are in accord. *Red River Levee District No. 1 v. Reconstruction Finance Corp.*, 170 F.2d 430 (8th Cir. 1948) (RFC held exempt from special assess-

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[1] It has been settled law for over a century that the federal government and its instrumentalities are exempt from state and local assessments for local improvements. *See, e.g., Van Brocklin v. Anderson*, 117 U.S. 151, 162 (1886); *Wisconsin Central R.R. v. Price County*, 133 U.S. 496, 504 (1890); *Mullen Benevolent Corp. v. United States*, 290 U.S. 89, 91 (1933); *Lee v. Osceola & Little River Road Improvement District*, 268 U.S. 643, 645 (1925). As noted by the court below (Pet. App. 10a), the expressed intent of Congress in enacting 45 U.S.C. § 546b was to make Amtrak exempt from taxes "to the same extent as the United States."

ment for flood control project); *United States v. City of Adair*, 539 F.2d 1185, 1189 (8th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977) (Commodity Credit Corporation held exempt from special assessment for unspecified local improvement); *Federal Reserve Bank of St. Louis v. City of Memphis*, 515 F.Supp. 63, 64 (W.D. Tenn. 1979), *aff'd* 649 F.2d 462 (6th Cir. 1981) (Federal Reserve Bank held exempt from special assessment for central city improvement district).

We are not aware of any decision by this Court or any court of appeals holding that special assessments for local improvements are not "taxes" within the meaning of federal statutes. Certainly, at least, Petitioner has not cited any. Moreover, as is shown by the exhaustive analysis of the legislative history of 45 U.S.C. § 546b undertaken by the courts below, it is manifest that Congress meant exactly what it said when it exempted Amtrak from "any taxes or other fees" imposed by any State, political subdivision of a State, or local taxing authority. The object of such taxes is immaterial; *all* have been prohibited.

2. No "Conflict in Federal Policy" Results From the Decisions Below

Unable to cite any conflict between the opinion below and previous decisions by this Court or other circuit courts, the Petitioner alleges that the decision below results in a "conflict in Federal policy," citing various Federal-aid statutes relating to repair or replacement of highway bridges over railroads. (Pet., 8-11)

The contrary is true. In addition to exempting Amtrak from any state or local taxes or other fees, Congress has directed the Secretary of Transportation to limit assessments against railroads for the costs involved in the elimination of hazards of railroad-highway crossings to the "net benefit" they derive, but in no event more than ten percent. 23 U.S.C. § 130(b). Pursuant to this di-

rective, the Secretary of Transportation has issued regulations, 23 C.F.R. § 646.210 (1988), reading in relevant part:

> (a) State laws requiring railroads to share in the cost of work for the elimination of hazards at railroad-highway crossings shall not apply to Federal-aid projects.
>
> (b) Pursuant to 23 U.S.C. 130(b) * * * (2) Projects for the reconstruction of existing grade separations are deemed to generally be of no ascertainable net benefit to the railroad and there shall be no required share of their costs, unless the railroad has a specific contractual obligation with the State or its political subdivision to share in the costs.

In the past, as in this case, the Pennsylvania Commission has sought to avoid the policies of federal law by using Amtrak as a secondary (and involuntary) source of federal aid on highway projects of insufficient importance to qualify for regular federal-aid highway funds. The effect of the decision below is to shut the door on this effort to circumvent federal policy.

Among the many states in which Amtrak operates, the Commonwealth of Pennsylvania stands alone in claiming the right to tax Amtrak for local public improvements. Other states have accepted and followed the decision by Judge Newcomer in 665 F.Supp. 402 (E.D.Pa. 1987), which was affirmed by the opinion below.

CONCLUSION

Further review by this Court is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September, 1988

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